No. 8, Original

In the Supreme Court of the United States

October Term, 1961

State of Arizona, complainant

v.

State of California, et al.

REPLY BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,

JOHN F. DAVIS,
Assistant to the Solicitor General,

DAVID R. WARNER,
WALTER KIECHEL, Jr.,
WARREN R. WISE,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

CITATIONS

614086—61——1

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 ORIGINAL

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

In our preceding briefs we have explained our limited exceptions to the Report of the Special Master and our arguments in support of the Report, subject to those exceptions. Accordingly, there is no need now to reply in detail to all the arguments made in the answering briefs of the other parties wherein views different from those advanced in our previous briefs are expressed. A brief reply on the most fundamental points, however, may be of assistance to the Court.

ARGUMENT

I

UPHOLDING THE VALIDITY OF THE PROVISIONS IN THE ARIZONA AND NEVADA CONTRACTS DIMINISHING THE OBLIGATION TO DELIVER STORED WATER TO THE EXTENT OF ANY DEPLETIONS OF THE RESERVOIR SUPPLY THROUGH UPSTREAM USES IS NOT INCONSISTENT WITH INTERPRETING SECTION 4(a) OF THE PROJECT ACT AS APPLICABLE ONLY TO MAINSTREAM WATERS

Arizona, Nevada and California, all disagree with our argument in support of our first and second exceptions to the Report. Arizona's and Nevada's disagreement arises from the benefit to each of those States from the Master's holding that each may receive its full allocation of the stored waters without regard to any depletion of the project water supply by uses in that State from the mainstream and the tributaries above Lake Mead. Each of those States argues, as does the Special Master, that it is only those waters which physically arrive in the reservoir which the Secretary of the Interior has authority to take into account in contracting for the disposition of and administering the project water supply. California, which would receive substantial benefit from modification of the Recommended Decree in accordance with our first and second exceptions, takes issue with the exceptions and our argument in support on the ground that our position "is irreconcilable with the Master's conclusions."

The Master's exclusion of the mainstream and tributary uses above Lake Mead is not a necessary consequence of the language of the Project Act or its legislative history. Nor does it necessarily follow

from the fact that water taken from above the reservoir does not pass into the physical control of the United States as a result of the construction and operation of Hoover Dam and related project facilities. We think it equally plain that a ruling that the Secretary of the Interior has full authority in his administration of the Boulder Canyon Project water supply to protect that supply by conditioning the amounts to be delivered for use in Arizona and Nevada upon the quantities of reservoir depletion as a result of upstream diversions in those States would not be inconsistent with the Master's determination that in the enactment of Section 4(a) of the Project Act Congress contemplated an allocation of the first 7,500,000 acre feet of mainstream water available in the Lower Basin and of the surplus mainstream water over that amount.

The Master's conclusion that Section 4(a) of the Project Act applies only to uses of mainstream water is fundamentally derived from the legislative history, which shows clearly that it was water passing through the mainstream that was the subject of Congressional consideration when that language was adopted. The issue concerning deductions for uses above Lake Mead rests upon different considerations. As noted in our opening brief, page 11, the predicate for the Master's conclusion that mainstream and tributary uses above Lake Mead are to be excluded from the Project Act accounting is the fact that "Hoover Dam gives the United States physical control of the water stored in Lake Mead and over the use of substantially all of the water in the mainstream below, but it does not enable

the United States physically to control the use of water from above Lake Mead." Consequently, to reject the view that the Secretary, in making allocations, can take into account only the water that actually passes into his physical control does not affect the foundation of the Master's interpretation of Section 4(a).

In our view the Master put too much weight upon the fact of actual physical control in considering the risk of upstream diversions which, unlike the use of tributaries below Lake Mead, would diminish the water available for storage and subsequent distribution. We submit that when Congress authorized the construction of Hoover Dam and related project facilities and the various facilities were constructed in accordance with such authorization, the United States, subject to the compact apportionment for use in the Upper Basin, preempted the waters of the Colorado River capable of being stored and regulated by those facilities for administration in accordance with the authorizing legislation and any other applicable acts of Congress. Obviously, the location of Hoover Dam, the principal project facility, means that waters which would pass through the mainstream and be regulated by Hoover Dam do not come under the *physical control* of the United States if they are diverted and used, either from the tributaries or the mainstream, above the reservoir. But this does not mean that Congress intended the successful operation of this great reservoir project and the successful administration of a statutory plan for distribution of the stored waters

under contract made with the Secretary of the Interior to be at the hazard of depletion of the mainstream supply by diversions above the reservoir. Cf. *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690; *United States* v. *Appalachian Power Co.*, 311 U.S. 377.

The reservoir, which Congress authorized for construction, was of sufficient size to impound and regulate the entire flow of the river undiminished by upstream tributary and mainstream depletions. Congress specified the purposes for which the stored waters might be used and placed the Secretary of the Interior in charge of distribution of the water supply so created. Surely, under the broad authority given to him by the Project Act, the Secretary is authorized in contracting for distribution of the project supply to assure that the purposes of the Project Act and of the facilities constructed thereunder will not be frustrated by diversions of the waters away from the project before they arrive in the reservoir. We submit that he would be remiss in the performance of his duties if he failed to take such action.

The situation here, although technically dissimilar, is substantially analogous to the appropriation of waters for federal reclamation projects. Frequently, when a reservoir for the storage of water is constructed under the reclamation law of the United States, the Secretary of the Interior does file the papers with State authority which are prescribed by State law for making an appropriation of the waters which the reservoir will impound and control. (See

Nebraska v. *Wyoming,* 325 U.S. 589.) When such procedure is followed, a State-recognized appropriation of the waters results which protects the project water supply against depletion as a result of later appropriations by others.

In the case of Hoover Dam and the related facilities of the Boulder Canyon Project, the United States has not chosen to follow this procedure. Some of the reasons are obvious. The Colorado River is a navigable stream, and the first and primary purpose of the project was, and is, flood control, improvement of navigation, and river regulation. The dam and reservoir, which were intended to impound water for use in the States of California, Arizona, and Nevada, is located in Nevada and Arizona, and no single state could purport to authorize an appropriation for the reservoir project. It is plain that, had such an application been made to the State of Arizona, it would have been refused. (See *Arizona* v. *California,* 283 U.S. 423.)

But the fact that the United States did not choose to go through the formalities of State-prescribed procedures for making an appropriation for the project does not mean that hundreds of millions of dollars of federal funds have been expended for the construction of great works, the usefulness of which might be impaired as a result of upstream diversions. By authorization and construction of the project for the purposes which Congress has specified, the United States has effectively "appropriated" for those purposes the waters which the project was built to control. Subsequent State-authorized appropriations above the

reservoir should not defeat accomplishment of those purposes just as they could not when an appropriation has been made in accordance with State procedure.

It was to prevent the defeat of this "appropriation" of mainstream waters that the Secretary stipulated that his obligation to deliver stored waters for use in Arizona and Nevada should be diminished to the extent that uses in those States from above the reservoir would deplete the reservoir supply. His action was in accordance with his responsibilities and fully consistent with Congress' plan for the allocation of the reservoir supply.

II

CALIFORNIA'S CONTENTION THAT THE SPECIAL MASTER'S INTERPRETATION OF SECTION 4(a) OF THE PROJECT ACT PRODUCES AN "INCREDIBLE RESULT" NEGLECTS FUNDAMENTAL INTER-BASIN ISSUES RESPECTING MEASUREMENT OF USE AND ACCOUNTABILITY FOR EVAPORATION LOSSES

In its answering brief, California attacks the Special Master's interpretation of Section 4(a) of the Project Act because it reaches what is described as "this incredible result: Even if the lower basin enjoys the use of the full quantities aggregating 8.5 million acre-feet under Article III(a) and III(b) of the Compact, and Mexico is satisfied from surplus without invasion of that quantity, California would receive only 3.8 million acre-feet—not even the 4.4 million acre-feet to which the first part of the limitation on California refers." (California Answering Brief, p.

614086—61——2

1.) The "incredible result" is neither so clear nor so simple as the argument suggests.

In the first place, California assumes that in determining the compact apportionment all tributary uses are to be measured by diversions less return flow at the various sites of use. This assumption as to measurement is subject to the most serious question even if it be assumed, contrary to Arizona's argument, that the compact apportionment includes Lower Basin tributary uses. Most of the tributaries of the Lower Basin, and particularly the Gila River, are wasting streams. Much of the water in their upper reaches would never arrive in the mainstream of the Colorado even if there were no upstream diversions from the tributaries for beneficial consumptive use.

By agreement between themselves the States of the Upper Basin have provided for allocation of that Basin's apportionment under the Colorado River Compact in terms of "man-made depletions of the virgin flow at Lee Ferry." Upper Colorado River Compact, Article VI, 63 Stat. 31. If Lower Basin tributary uses are to be included and measured for compact accounting purposes in terms of depletion of the virgin flow at one or more significant mainstream points, the California argument as to "incredibility" loses any force. The evidence before the Special Master indicates that the Lower Basin tributary uses measured by diversions less return flows at the respective sites of use are materially larger than if measured by depletion of the mainstream at significant downstream points. If, in the California hypothesis, the tributary uses are calculated by the latter method,

the quantity of mainstream water "adequate for all components of the Compact in the lower basin, after satisfaction of the treaty requirements" (California Answering Brief, p. 11), is not 6.5 million acre-feet but a substantially larger amount. California would not be compelled, under the Master's interpretation, to accept only 3.8 million acre-feet of the available mainstream water upon its assumption of full satisfaction of the Lower Basin's apportionment under Article III(a) and III(b) of the Compact.

On the other hand, if, as California contends, the Master erroneously referred to the legislative history to determine what Congress meant when it used the words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact," then he is equally in error in having referred to the legislative history to determine what Congress meant when it used the words "plus not more than one-half of any excess or surplus waters unapportioned by said compact." And in that event the Article III(b) component of the mainstream water would not be available for use in California.

The foregoing demonstrates one fallacy in California's charge that the Master's interpretation of the Project Act produces an "incredible result." Further brief analysis of the hypothesis is sufficient to demonstrate its inadmissibility, and the utter futility of attempting in this case to make an interstate allocation upon an hypothesis supposed to be consistent with the interbasin apportionment effected by the Colorado River Compact is demonstrated by the questions which it raises but leaves unanswered. In the compact by

which the states of the Upper Basin agreed respecting allocation between themselves of the Upper Basin apportionment, reservoir losses of water in storage for use in the Upper Basin are accepted as charges against the interbasin apportionment and as charges against the respective State allocations. See Upper Colorado River Compact, Article V. The logic of this treatment of reservoir losses is plain enough. It seems equally plain that in any interbasin accounting the losses of water in storage for use in the Lower Basin are chargeable against the Lower Basin apportionment. But California's hypothesis assumes that under the Colorado River Compact the Lower Basin may have 8.5 million acre-feet in satisfaction of the Article III(a) and III(b) apportionments, "plus all evaporation and other losses, whatever those losses may be" (California Answering Brief, pp. 8–9). She makes no suggestions as to how the interbasin charge for such losses can be disregarded in her hypothesis of "full service" of the Lower Basin allocation of 8.5 million acre-feet. Neither does her argument suggest how such charge is to be allocated among the Lower Basin States,[1] nor is there any indication of the disposition to be made of the excess water in the assumed

[1] California's postulate in footnote 6, page 9, of her Answering Brief that these losses are "diminutions of supply" is acceptable under the solution which the Special Master's Recommended Decree proposes. It could not be accepted if the effort in this case were to assure that the interstate allocations here to be approved can be squared at every corner with the apportionment to the Lower Basin effected by Article III of the Colorado River Compact.

8.5 million acre-feet which would result from the charge so to be made against the Basin apportionment. The Special Master's interpretation of the Project Act eliminates such questions from the case. If the California hypothesis were to be otherwise accepted, they would have to be answered. Any effort to ascertain Congress' intention in enacting Section 4(a) of the Project Act by attempting to assure that the interstate allocation therein provided accords in all respects with the highly uncertain requirements for interbasin accounting under the Colorado River Compact leaves the issues in this case as obscure as they were at the outset of the litigation, and insoluble in the absence of the Upper Basin States.

Second, even if California's hypothesis were valid, the argument does not demonstrate that the Master erred in concluding that, when Congress adopted the critical language of Section 4(a) of the Project Act, it was thinking in terms of the first 7.5 million acre-feet of mainstream water available for use in the Lower Basin in the States of California, Arizona and Nevada and the available mainstream waters in excess of the first 7.5 million acre-feet. The evidence that such was Congress' intention is reviewed at pages 27–46 of our answering brief. The fact that Congress may not have fully foreseen the consequences of what it did intend does not mean that its intention was different from what the language of the Act and the legislative history indicates. There is no evidence whatever that Congress intended, as California seems

to argue, the limitation of California's future use to 4.4 million acre-feet plus one-half of the surplus or excess as a guarantee of any quantity of water for use in that State. The limitation is a limitation and nothing more. The only guarantee of the Project Act is that to be found in the Section 6 requirement for satisfaction of "present perfected rights." Under the Master's interpretation of that provision, the Act does guarantee the satisfaction of California's claimed rights which were perfected as of the effective date of the Project Act in the order of their priority with relationship to all other "present perfected rights." But beyond this the Act makes no guarantee and in the extremely unlikely event of water insufficient to satisfy all "present perfected rights" California's claims of such rights would have to yield to others in accordance with their respective priority dates.

III

THE PROJECT ACT DOES NOT PROVIDE FOR PRIORITIES INTERSTATE EXCEPT IN ITS REQUIREMENT FOR SATISFACTION OF "PRESENT PERFECTED RIGHTS"; PRIORITIES INTRASTATE ARE GOVERNED BY APPLICABLE FEDERAL LAW AND CONTRACTS MADE UNDER THE PROJECT ACT

California's answering brief in arguing for a system of interstate priorities appears to misconceive the government's arguments in its opening brief in support of its exceptions; to misapply Section 8 of the Reclamation Act; and to misread some of the decisions of this Court on which reliance is placed. In order that there may be no misunderstanding of our position with respect to priority of right under the

Boulder Canyon Project Act in distribution of the water supply which that Act directs the Secretary of the Interior to administer, we summarize it here.

We support the Master's determination that principles of priority of appropriation in accordance with the laws of the several States having access to the mainstream of the Colorado River and principles of equitable apportionment as enunciated in prior decisions of this Court are inapplicable with respect to the controversy relating to the mainstream of the Colorado River. We agree with the Special Master that such principles are inapplicable here because Congress, in exercise of its exclusive power to control the waters of the Colorado River, has provided its own procedure for effecting an interstate allocation.

Congress has authorized the construction of a dam capable of impounding and controlling substantially the entire flow of the River in the Lower Basin. The dam and related facilities through which much of the impounded water may be put to use have been constructed. Under authority of the Project Act, and in accordance with its command that "[n]o person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated," contracts have been made for delivery of much of the waters which the reservoir was constructed to impound and regulate and, by contract with the States of Arizona and Nevada, commitments have been made for the future delivery of additional quantities for use in those States.

Under the statutory and contractual plan for allocation intrastate as well as interstate, there is no provision for priority except as it may be found in the Section 6 requirement for satisfaction of "present perfected rights" and as it may be incorporated into the contracts which have been and may be made under the Project Act and other applicable laws. Insofar as claims of appropriative rights recognized under State law prior to the effective date of the Project Act are concerned, Congress indicated, in Section 6, its intention to recognize only those which were perfected at that date by the actual application of water to specific areas. Since the reserved rights of the United States were perfect without the application of water to specific areas, they are entitled to recognition under Section 6 without regard to when water may be or may have been applied to accomplishment of the purposes of the reservations. To the extent that California's claimed prior rights meet the test for "present perfected rights," the recommended decree recognizes the priorities which that State so strenuously asserts. To the extent, however, that California's uses do not meet that test, its rights must depend upon contracts made by its agencies with the Secretary. California's attempt to distinguish between claims of right to "natural flow" and uses of stored water is invalid. The Project Act recognizes no "natural flow rights" except those which qualified as "present perfected rights."

1. It is plain that the Project Act does not contemplate the recognition of interstate priorities in the contracts made under the Project Act. Otherwise,

Congress' obvious intention that the first seven and a half million acre-feet of mainstream water available be allocated in specified proportions would not be accomplished. For reasons stated at pages 21 to 47 of our Brief in Support of Exceptions to the Special Master's Report, we think it is also plain that Congress did not delegate to State authorities, acting under State law, the extremely important problem of determining, intrastate, either the amounts of stored water to be delivered to the various users within a State or the relative priorities between them. These are determinations which must be made by the Secretary of the Interior in his administration of the project water supply, in accordance with the provisions of applicable laws of the United States and the many factual considerations which must be taken into account in the administration of that supply.

The problem of quantities and relative priorities within the California allocation has been resolved by incorporation into each of the contracts with the California agencies of the priority schedule established by the California Seven Party Agreement. So far as we know, there is no challenge to the authority of the Secretary so to establish priorities as between uses within the California allocation. Accordingly, it is assumed that deliveries for use in California will, if shortage occurs, be made in accordance with the priority schedule adopted by the several California contracts, subject only to the requirements of the decree respecting the reserved rights of the United States and the further requirements for satisfaction of "present perfected rights."

With respect to the making of contracts for the delivery of stored water for use in Arizona and Nevada, the necessity for consideration of relative priorities as between various contract users has arisen only in connection with the Secretary's relatively recent contract with the city of Yuma. See footnote 11, page 31, Brief in Support of the Exceptions of the United States to the Special Master's Report. This is because the contracts which have thus far been made for the delivery of water for use in those States, together with the reserved rights of the United States, have not even approached the minimum limits of the aggregate quantities of stored water regularly available for use in those States. In the case of the contract with the City of Yuma, the Secretary deemed it advisable to condition the contract on the City's agreement that its right to receive the quantity specified in the contract shall be subordinate to the satisfaction of commitments previously made for uses within the Arizona allocation.[2] It may be assumed that future contracts

[2] Contrary to the implication of California's comment at pages 60–61 of its answering brief, the subordination provision in this agreement imposes no hardship or injustice on the City of Yuma. What California refers to as "an appropriation senior to those agricultural districts under which she had been continuously using 'mainstream' water for more than half a century" was for a much lesser quantity of water than that for which the contract provides. To the extent that Yuma's claim under that "appropriation" qualifies as a "present perfected right" the City will, under a decree as recommended by the Special Master, be entitled to continue to receive water in priority with other holders of "present perfected rights." However, to receive the additional water for which the contract provides, the City must properly abide by its agreement, just as the several California agencies must abide by their agreements

for the delivery of water for use in Arizona, as well as future contracts for use in Nevada when the need arises, will contain the same condition unless Congress directs otherwise.

The inclusion of this condition is consistent with the practices which the Secretary of the Interior has followed in other areas. For example, the waters controlled by Friant Dam for the Friant unit of the Central Valley Project in California have been divided into class I and class II. The aggregate quantity of class I water is the quantity which it is anticipated will be available on a firm basis annually. The class II water comprises that supply which becomes available in addition to class I water and is recognized to be undependable in character. The contracts in this area generally include commitments for both class I and class II water. The class I supply is limited contractually in the aggregate to 800,000 acre feet annually. All class I commitments have a priority over class II commitments, but in the event that less water is available in either class than that for which there are commitments, the water avail-

---

respecting priority within the California allocation. Nor do we share California's concern about the Valley Division of the Yuma Project in Arizona, as expressed in footnote 5 on page 62 of the California answering brief. The use of water on that Project had been largely "perfected" in 1929. With respect to expanded uses there since that date, it is our position that the authority vested in the Secretary of the Interior includes the authority to provide in future contracts for subordination just as he has done in the contract with the City of Yuma. For this reason, we do not consider that either the Valley Division of the Yuma Project or the other projects in the Yuma area are in a "perilous situation."

able in each class is apportioned ratably to the amount committed to each contractor.

The fact that the Secretary has made some contracts under which the users will share ratably in times of shortages, while he has made others which prescribe priorities between users in the same State, does not aid California's argument for a system of interstate priorities under the Project Act over and beyond the Section 6 requirement for the satisfaction of "present perfected rights." As noted above, the principle of parity as between interstate allocations appears clearly to follow from Congress' obvious intention that the aggregate project water supply be allocated for use in the several States in specified proportions. The limit on California's use to 4.4 million acre-feet cannot be divorced from the plain intention to make another 3.1 acre-feet available for use in Arizona and Nevada. Likewise, limiting California to use of one-half of the surplus or excess waters plainly contemplates the existence of another one-half, to round out the whole. The universe with which Congress dealt was 7.5 million acre-feet plus the available mainstream waters over and above that amount. There is nothing to indicate that Congress intended, if the universe should prove to be less than 7.5 million acre-feet, to divide it in proportions different from those applied to the size assumed except for the satisfaction of "present perfected rights."

2. California suggests that our reasoning at pages 15–21 of our Brief in Support of Exceptions to the Special Master's Report supports its argument for

a broader system of interstate priorities, but the suggestion misconceives the reasoning. Our argument was addressed to the Special Master's determination that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract violate the Project Act insofar as they condition the quantities of mainstream water to be delivered upon the extent to which uses in those States upstream from Lake Mead deplete the reservoir supply. We simply assumed, *arguendo,* as did the Special Master, that in a contest between an appropriator on an upstream tributary and a contract user of stored water, the appropriator's claim would be junior under State law if it post-dated the contract claim. This *arguendo* assumption does not bear on the question of relative priorities between contract users under the Project Act.

3. California's arguments respecting Section 8 of the Reclamation Act and Section 18 of the Project Act likewise misinterpret those provisions and appear to misconceive the nature of the Boulder Canyon Project.

Section 8 of the Reclamation Act provides that nothing in the Act be construed as affecting State laws relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and it directs the Secretary of the Interior, in carrying out the provisions of the Act, to proceed in conformity with such laws. (43 U.S.C. 383.) Section 8 also provides that nothing in the Act shall affect the rights of any State, the Federal Government, or any landowner, in any inter-

state stream or the waters thereof. It further specifies that the right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and that beneficial use shall be the basis, measure, and the limit of the right (43 U.S.C. 372). It does not specify that waters brought under the control of the United States by the construction of a reclamation project shall be distributed by the Secretary in accordance with the determination of State authorities made under State law. Neither does it specify that such waters shall be distributed within the project in accordance with principles of priority of appropriation. Section 8 has never been construed by the Secretary of the Interior as prescribing any rules as to priority between users of the water supply created by construction of a storage project. All questions of priority as between users within a project, and as between separate divisions of a project receiving water from the same project supply, have been determined by contract between the Secretary and the project landowners or water-distributing organizations made under authority of the various provisions of reclamation law. In the absence of specific statutory or contractual provisions to the contrary, ratability in the event of shortage in the project supply has been the rule.

It is not pertinent to this controversy to argue the question of relative priorities between completely separate federal reclamation projects on the same stream system, either in the light of, or regardless of, the provisions of Section 8 of the Reclamation Act. That is not the question which is before the Court in this

case. The Boulder Canyon Project is a single project. Hoover Dam creates a reservoir having an original unsilted storage capacity of over 32,000,000 acre-feet. The great quantity of water thus brought under control is distributed for use in an extensive area through a considerable number of related sub-projects, some of which have been constructed under federal law and some of which have been privately financed. But notwithstanding the extensive and varied facilities which are required for utilization of all the waters which Hoover Dam impounds, there is no room for any argument that principles applicable to the resolution of conflicts between separate projects claiming rights under separate appropriations under State law on the same stream system are applicable to distribution of the water supply created by the great storage project with which we are here concerned.[3]

There is nothing in any of the decisions of this Court which California cites in support of her contentions respecting Section 8 which supports that argument. On the contrary, each of those cases shows the fallacy of the argument.

In *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 291–292, the Court said with unmistakable clarity:

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation

[3] We have dealt quite extensively with Section 18 of the Project Act in Point III of our Brief in Support of Exceptions to the Special Master's Report. We see nothing in California's arguments respecting that section requiring amplification of the analysis previously made.

> project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system." * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State.

The fact that in *Nebraska* v. *Wyoming,* 325 U.S. 589, the Court held that on the record in that case title to the appropriative natural flow rights was in the project landowners rather than in the United States has nothing to do with the questions here presented. We emphasize that it was from the opinion in *Nebraska* v. *Wyoming* that the Court in *Ivanhoe* quoted, in support of its statement that the acquisition of water rights must not be confused with the operation of federal projects, the sentence: "We do not suggest that where Congress has provided a system of regulation for federal projects, it must give way before an inconsistent state system."

Likewise, as noted in footnote 19, at page 43, of our Brief in Support of Exceptions to the Special Master's Report, there is nothing in the Court's opinion in *Ickes* v. *Fox,* 300 U.S. 82, which supports California's argument that under the Boulder Canyon Project Act priorities are to be observed interstate over and beyond the Act's specific requirement for satisfaction of "present perfected rights." In that

case the Court simply held that under the undenied allegations of the petition, the Secretary of the Interior exceeded his authority when he sought to require from landowners within a reclamation project, who held fully paid water right application contracts, additional payments to reimburse the cost of an addition to the project from which they would receive no benefit. The Court expressly predicated its decision on "the terms of the ~~new~~ law [i.e., the Reclamation Act] and of the contract already referred to * * *."

We respectfully submit that, as determined by the Special Master, Congress has specifically provided for the recognition of interstate priorities to the extent of the satisfaction of "present perfected rights." There is nothing in the general language of Section 8 of the Reclamation Act or in Section 18 of the Project Act or in any other provision of applicable law to justify extending this express but limited provision so that principles of priority of appropriation would apply as a matter of law, interstate or intrastate, with respect to uses under contract which had not been perfected when the Project Act became effective.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

DAVID R. WARNER,
WALTER KIECHEL, JR.,
WARREN R. WISE,
Attorneys.

OCTOBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961